

to disburse hereunder. Any and all advances or payments made by Lender under this Agreement from time to time, or for Costs, shall, as and when advanced or incurred by Lender, constitute additional Indebtedness evidenced by the Note and secured by the Pledge Agreement and the other Loan Documents to the same extent and effect as if the terms and provisions of this Agreement were set forth therein, whether or not the aggregate of such indebtedness shall exceed the aggregate face amount of the Note.

5.29 **Indemnity.** Borrower shall indemnify, protect, hold harmless and defend Lender, its shareholders, directors, officers, employees, and agents and their respective successors and assigns from and against any and all Losses arising out of or in connection with (a) any claim by any purchaser of a Unit or the Association relating to or arising from the offer for sale or sale of Units, including (i) claims alleging any defect in any portion of the Project, including any common area or any Unit, and (ii) any non-compliance with any applicable law or any alleged breach of any warranty, promise or obligation of any kind whatsoever (whether express, implied, created by law or otherwise) relating directly or indirectly to any such offer or sale, of any Unit, (b) without limiting the terms of item (a) of this Section, the Property, (c) the Collateral (except based solely on diminutions in value), (d) the Loan Documents, (e) any violation of Laws by any Loan Party, (f) any act or omission of Borrower, any other Loan Party, or their respective employees or agents, whether actual or alleged, (g) any and all brokers' commissions or other costs of similar type by any party (except Lender or its Affiliates) in connection with the Loan, in each case except to the extent (i) arising from any such indemnitee's gross negligence or willful misconduct or (ii) arising out of or related to actions after Lender or any of its Affiliates takes control of the Property or the Collateral or (h) arising out of or attributable to any past, present or future non-compliance with the ADA. Upon written request by an indemnitee, Borrower will undertake, at its own costs and expense, on behalf of such indemnitee, using counsel reasonably satisfactory to the indemnitee, the defense of any legal action or proceeding for which Borrower is obliged to provide indemnity under this Section 5.29. Borrower's obligations are conditioned on the indemnitee notifying Borrower of the applicable claim against the indemnitee upon written notice of such claim and cooperating with Borrower in the defense of such claim, but failure to notify Borrower or to cooperate in the defense shall excuse Borrower from its obligations only to the extent Borrower or Lender is prejudiced by such failure. At Lender's option, Lender may, at Borrower's expense, prosecute or defend any action involving the priority, validity or enforceability of the Pledge Agreement or any of the other Loan Documents. Borrower's indemnification set forth in this Section 5.29 shall survive the repayment in full of the Loan.

5.30 **Documents of Further Assurance.** Borrower shall, and shall cause the other Loan Parties to, from time to time, upon Lender's request, execute, deliver, record and furnish such documents as Lender may reasonably deem necessary or desirable to (a) perfect and maintain perfected as valid liens upon the Collateral and the liens granted by Borrower to Lender under the Pledge Agreement and the other Loan Documents as contemplated by this Agreement, (b) correct any errors of a typographical nature or inconsistencies which may be contained in any of the Loan Documents, and (c) consummate fully the transaction contemplated by this Agreement.

5.31 **Survival of Representations and Warranties.** Borrower agrees that all of its representations and warranties set forth in Article 4 and elsewhere in this Agreement will be true

at the Loan Opening Date and, subject to the terms of Article 4, at all times thereafter. Each request for disbursement of the Loan shall constitute a reaffirmation that such representations and warranties (other than those stated to be as of the date of this Agreement) as deemed modified in accordance with the disclosures made in writing to and approved by Lender remain true and correct in all material respects, as of the date of such request and disbursement. At Lender's request, Borrower shall reaffirm such representations and warranties as are required by this Section 5.31 in writing prior to any disbursement hereunder.

5.32 Construction Documents; Change Orders. Borrower shall not, without the prior written consent of Lender, (a) enter into or permit Owner to enter into any Construction Documents, or (b) amend, modify, or waive or permit Owner to amend, modify or waiver any material provision of any Construction Documents except by Permitted Change Orders. Borrower shall provide to Lender within five (5) business days after Borrower's or Owner's receipt thereof copies of all Construction Documents or any amendments to or modifications of any Construction Documents. Notwithstanding the foregoing, provided there is no Event of Default existing, Borrower may re-allocate the Contingency Fund for Hard Costs without the Lender's consent (but only, with respect to the Contingency Fund for Hard Costs set forth in the Construction Budget) up to an amount equal to fifty percent (50%) of that portion of the initial amount allocated to the Contingency Fund for Hard Costs set forth in the Construction Budget, which portion bears the same relation to the entire initial amount allocated to the Contingency Fund for Hard Costs in the Construction Budget as the portion of the costs then expended to date for the Improvements bears to the entire amount for the Completion of the Improvements set forth in the Construction Budget; provided that Contingency Fund for Hard Costs shall be re-allocated only to Budget Line Items for Hard Costs, and shall not be allocated to any Budget Line Items for Soft Costs without the prior consent of the Lender which may be granted or withheld in its sole and absolute discretion. Provided there is no Event of Default existing, Borrower may (i) with the Lender's consent (not to be unreasonably withheld) re-allocate the Contingency Fund for Soft Costs up to an amount equal to sixty-five percent (65%) of the initial amount allocated to the Contingency Fund for Soft Costs, and (ii) without the Lender's consent re-allocate that portion of the remaining thirty-five percent (35%) of the initial amount allocated to the Contingency Fund for Soft Costs, which bears the same relation to the entire initial amount allocated to the Contingency Fund for Soft Costs in the Construction Budget as the portion of the Construction Budget then expended to date for the Improvements bears to the entire amount for the Completion of the Improvements set forth in the Construction Budget.

5.33 Transfer and Other Taxes. Borrower shall indemnify, protect, hold harmless and defend Lender, its shareholders, directors, officers, employees, and agents and their respective successors and assigns from and against all Losses that Lender may incur, directly or indirectly in connection with any transfer, deed, mortgage or other tax imposed in connection with (a) Lender's acquisition of the beneficial interests in Borrower as a result of the exercise of any remedies under the Pledge Agreement, and (b) Lender's purchase of the Senior Loan pursuant to the terms of the Intercreditor Agreement.

5.34 Construction Reporting. Borrower shall provide to Lender within five (5) business days of Lender's request therefore copies of any and all inspection reports and violation notices with respect to compliance of the Property with applicable Laws. In addition, Borrower shall make available to Lender for inspection and copying at any time upon reasonable written

notice, during reasonable business hours and at a mutually convenient location all lien waivers, sworn statements, invoices, certifications and other documentation supporting Borrower's requests for disbursements hereunder or otherwise relating to the Property and not otherwise delivered to Lender under this Agreement.

5.35 Construction of Property.

(a) Borrower shall cause Owner to commence construction of the Property no later than October 30, 2005, and achieve Completion on or before the Required Completion Date. Borrower shall cause Owner to Complete the Improvements in substantial accordance with the Construction Documents in a good and workmanlike manner free of material defects on or before the Required Completion Date, and thereafter shall diligently proceed with completion of any Punchlist Items.

(b) Within 30 days after Completion, Borrower shall furnish Lender two (2) copies of a survey of the completed Property prepared by a registered land surveyor in accordance with the 1999 Minimum Standard Detail Requirements for ALTA/ASCM Land Title Surveys, including Items 1, 2, 3, 4, 6, 7(a), 7(b) 7(c), 8, 9, 10, 11, 12, 14, 15 and 16 in Table A thereof, and certified in favor of Borrower, Lender and the Title Company by certification in form like the pre-construction survey delivered to Lender or otherwise reasonably acceptable to Lender.

(c) In the event that any temporary certificate of occupancy for the Property has been issued and delivered to Borrower or Owner, Borrower or Owner shall receive, within one (1) year after the Initial TCO Date, a final permanent certificate of occupancy for the Property which permits the Property to be used for its intended purpose and in compliance with all Laws; provided, however, that such one (1) year period shall be extended as to any temporary certificate of occupancy for a Unit when completion of the work necessary for the issuance of a final permanent certificate of occupancy is work necessary to complete upgrades based on selections made by the purchaser after a date that is too late to effect such work within such one (1) year period, as provided in the applicable Qualified Sales Contract.

5.36 Contracts for Sale of Units. Without the prior written consent of Lender, Borrower (i) shall not enter into or at any time be a party to (or permit Owner to enter into or at any time be a party to) any contract to sell any Unit other than a Qualified Sale Contract, (ii) shall at all times cause Owner to duly perform and observe all of the terms, provisions, conditions and agreements on Owner's part to be performed and observed under any and all contracts for the sale of any Units, and shall not suffer or permit any event of default to exist thereunder on the part of Owner; and (iii) shall not agree to consent to, or suffer or permit, (A) any modification or amendment of any contract for the sale of a Unit that would cause such contract to fail to satisfy any of the requirements of the definition of the term "Qualified Sale Contract" in this Agreement, including by directly or indirectly reducing the sale price under such contract to an amount, such that the reduced price, when added to the base sale price of all

other Units previously sold or then subject to a Qualified Sale Contract, is less than the Minimum Sales Price (as set forth in Exhibit C to this Agreement) for all such Units, or (B) any other material modification or amendment of any contract for the sale of a Unit that would adversely affect Lender. In addition to the foregoing, following an Event of Default hereunder, Borrower, shall not agree to consent to, or suffer or permit any modification or amendment of any contract for the sale of a Unit that would adversely affect Lender, in each case without the prior written consent of Lender, which consent may be withheld in Lender's sole discretion.

5.37 Condominium Covenants. Borrower shall not enter into the Declaration or any other Constituent Documents without the prior written consent of Lender, which consent will not be unreasonably withheld or delayed. Prior to the recordation of the Constituent Documents, Lender shall have received and approved the form of condominium endorsement to the Title Insurance Policy, which endorsement affirmatively insures the validity of the condominium after the recordation of Constituent Documents. Upon the recordation of the Constituent Documents, Borrower shall provide Lender evidence of the issuance of such condominium endorsement. Such endorsement shall be in form and substance satisfactory to Lender.

5.37.1 From and after the time the Property is converted to a condominium form of ownership, Borrower covenants and agrees to perform the following covenants:

(a) **Condominium Obligations.** Borrower shall perform or cause to be performed all of Borrower's and Owner's obligations under the Constituent Documents and, for so long as Owner controls the Association, all of the obligations of the condominium association established pursuant to the Declaration ("Association") under the Constituent Documents. Borrower shall not suffer or consent to the amendment of any of the Constituent Documents without the prior written consent of Lender. Borrower shall promptly pay when due or cause Owner to pay when due, all dues and assessments imposed pursuant to the Constituent Documents on Borrower or Owner.

(b) **Board of Managers.** Subject to the rights of Senior Lender under the Senior Loan Documents and the Intercreditor Agreement, Borrower shall have caused to be duly executed and delivered to Lender and Senior Lender conditional resignations of the officers and members of the Board(s) of Managers of the applicable Association(s) to the extent elected, appointed or controlled by Borrower, Owner, any Guarantor or any Affiliate of any of the foregoing.

(c) **Hazard Insurance.** So long as the Association maintains with a generally accepted insurance carrier, a "master" or "blanket" policy on the Property which is satisfactory to Lender and which provides insurance coverage in the amounts, for the periods, and against the hazards Lender requires under this Agreement, including fire and hazards included within the term "extended coverage", Borrower's obligation under this Agreement to maintain or cause to be maintained hazard insurance coverage on the Property shall be satisfied to the extent that the required coverage is provided by the Association. Borrower shall give Lender prompt notice of any lapse in required hazard insurance coverage provided by the master or blanket policy. In the event of an insured casualty to all

or a portion of the Property, insurance proceeds from insurance maintained by the Association shall be distributed and utilized in the manner required by the Constituent Documents. In the event of a distribution of hazard insurance proceeds in lieu of restoration or repair following a loss to the Property, whether to the Unit(s) or to common elements, any proceeds received by Owner or Borrower shall be paid in the manner set forth in Article 7.

(d) Sales of Units. Borrower shall and shall cause Owner to comply with the requirements of all applicable Laws in connection with the sale of Units.

5.38 Sale of Retail Space. Borrower shall have the right to sell retail Units without Lender's prior consent.

5.39 Lender's Consultant. Borrower acknowledges that (i) Lender shall be entitled to retain from time to time at Borrower's sole cost and expense, a construction manager or consultant ("Lender's Consultant") to act as a consultant and only as a consultant to Lender in connection with the Improvements and work contemplated in the Construction Budget, (ii) Lender's Consultant shall in no event or under any circumstance have any power or authority to make any decision or to give any approval or consent or to do any other act or thing which is binding upon Lender and any such purported decision, approval, consent, act or thing by Lender's Consultant on behalf of Lender shall be void and of no force or effect, (iii) Lender reserves the right to make any and all decisions required to be made by Lender under this Agreement and to give or refrain from giving any and all consents or approvals required to be given by Lender under this Agreement and to accept or not accept any matter or thing required to be accepted by Lender under this Agreement, in each instance, unless otherwise expressly provided, in its reasonable discretion, and without in any instance being bound or limited in any manner or under any circumstance whatsoever by any opinion expressed or not expressed, or advice given or not given, or information, certificate or report provided or not provided, by Lender's Consultant to Lender or any other person or party with respect thereto, (iv) Lender reserves the right in its sole and absolute discretion to disregard or disagree, in whole or in part, with any opinion expressed, advice given or information, certificate or report furnished or provided by Lender's Consultant to Lender or any other person or party, and (v) Lender reserves the right in its sole and absolute discretion to replace Lender's Consultant with another construction consultant at any time and without prior notice to or approval by Borrower. Borrower shall cooperate with and cause Owner to cooperate with Lender's Consultant and use all commercially reasonable efforts to ensure that Lender's Consultant can inspect the Property and the work being performed thereat at such times as Lender's Consultant may reasonably request from time to time.

5.40 Patriot Act. None of Borrower, Owner, or any Guarantor, or, to the best of Borrower's knowledge, any of their respective Affiliates, brokers or agents, is a Prohibited Person. None of Borrower, Owner, or any Guarantor or, to the best of Borrower's knowledge, any of their respective Affiliates, brokers or agents, (i) has conducted or will conduct any business or has engaged or will engage in any transaction or dealing with any Prohibited Person, including making or receiving any contribution of funds, goods or services to or for the benefit of any Prohibited Person; (ii) has dealt or will deal in, or otherwise has engaged or will engage in any transaction relating to, any property or interests in property blocked pursuant to the

Executive Order; or (iii) has engaged or will engage in or has conspired or will conspire to engage in any transaction that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in the Executive Order (as defined below) or the Patriot Act. Borrower covenants and agrees to deliver to Lender any certification or other evidence requested from time to time by Lender in its sole discretion, confirming Borrower's, Owner's, each Guarantor's, and to the best of Borrower's knowledge, any of their respective affiliates', brokers' and agents' compliance with this Section 5.40. The term "**Prohibited Person**" shall mean any Person:

- (i) listed in the annex to, or Borrower knows to be otherwise subject to the provisions of, Executive Order No. 13224 on Terrorist Financing, effective September 24, 2001, and relating to Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism (the "Executive Order");
- (ii) that Borrower knows to be owned or controlled by, or acting for or on behalf of, any person or entity that is listed in the annex to, or is otherwise subject to the provisions, of the Executive Order;
- (iii) that Borrower knows to be a Person with whom a Person is prohibited from dealing or otherwise engaging in any transaction by any terrorism or money laundering Law, including the Executive Order;
- (iv) that Borrower knows to be a Person who commits, threatens or conspires to commit or supports "terrorism" as defined in the Executive Order; or
- (v) that is named as a "specially designated national and blocked person" on the most current list published by the U.S. Treasury Department Office of Foreign Assets Control at its official website or at any replacement website or other replacement official publication of such list.

5.41 **Transfers of Senior Loan.** With respect to any transfer of the Senior Loan by Senior Lender, Borrower shall not consent and shall not permit Owner to consent to any such transfer requiring Borrower's or Owner's consent without the prior written consent of Lender, which consent shall not be unreasonably withheld or delayed.

5.42 **Unit Sales.** In connection with the sale of any Unit, Borrower shall comply and shall cause Owner to comply with all applicable Laws, including the Interstate Land Sales Full Disclosure Act, as amended.

5.43 **Compliance with ADA.** Borrower covenants and agrees that (a) the Property shall at all times comply with all requirements of the ADA, (b) Borrower shall, at its sole cost and expense, cause Owner to comply with all reasonable written requests of Lender to (i) effectuate compliance with the ADA and (ii) comply with any directive from any governmental authority relating to ADA compliance and (c) Borrower shall immediately notify Lender in writing of (i) any non-compliance with the ADA related in any way to the Property and (ii) any written or oral notice or other communication of which Borrower, Owner or any Guarantor becomes aware from any source whatsoever (including a governmental entity) relating in any way to the ADA or compliance therewith, possible liability of any Person pursuant to the

ADA with respect to the Property, or any actual or potential administrative or judicial proceedings with respect to the Property in connection with the ADA. In the event Lender has a reasonable basis to believe that the Property is not in compliance with the ADA, upon reasonable notice from Lender, Borrower shall, at Borrower's expense, promptly cause an engineer or consultant reasonably satisfactory to Lender to conduct any ADA assessment reasonably required by Lender (the scope of which shall be determined in the sole and absolute discretion of Lender exercising commercially reasonable judgment) and promptly deliver the results of any such assessment. Borrower shall cooperate with and provide Lender and any such Person designated by the Lender with access to the Property.

5.44 **ADA Claims.** Borrower shall immediately advise Lender in writing of: (a) any ADA Claims; and (b) the discovery by Borrower, Owner or any Guarantor of any occurrence or condition on the Property or any real property adjoining or in the vicinity of the Property that could cause the Property or any part thereof to be subject to any ADA Claims. Lender shall have the right but not the obligation to join and participate in, as a party if it so elects, any legal proceedings or actions initiated in connection with any ADA Claims and Borrower shall pay to Lender, upon demand, all Costs incurred by Lender in connection therewith.

5.45 **Tax Parcel.** Borrower will cause the Property to be a single tax parcel and will obtain a single tax parcel endorsement to the Title Insurance Policy within thirty (30) days following receipt of the first (1st) tax bill for the Property from the City of Boston.

5.46 **Assignment of Accounts.** Borrower will cause the Owner to execute the Assignment of Accounts in the form attached hereto as Exhibit H within five (5) business days of the date upon which the Senior Loan has been repaid.

ARTICLE 6 - SENIOR LOAN

6.1 **Compliance with Senior Loan Documents; Lender Cure.** Borrower shall, or shall cause each Loan Party, as applicable, to (a) pay all principal, interest and other sums required to be paid by it under the Senior Loan Documents; (b) diligently perform and observe (and cause each Loan Party to observe and perform) all of the terms, covenants and conditions of the Senior Loan Documents, unless such performance or observance shall be waived in writing by Senior Lender; (c) give Lender written notice of any default under the Senior Loan Documents within five (5) days of Borrower's or Owner's actual knowledge of such default and, if Borrower or Owner has received written notice of default from Senior Lender, promptly give Lender a copy of such notice; (d) promptly give Lender copies of any consents, notices, requests or other written correspondence between Borrower, Owner, any Guarantor or any Affiliate of any of the foregoing, and, in each case, Senior Lender, and copies of any financial statements and other information and reports delivered to Senior Lender; and (e) not enter into or be bound or permit the entry into or becoming bound by any agreements, documents or instruments with respect to the Senior Loan (including any amendments to or modifications of the Senior Loan Documents) except to the extent that Borrower has received Lender's prior written approval of the same or the same are otherwise permitted without Lender's consent in the Intercreditor Agreement. Without limiting the generality of the other provisions, and without waiving or releasing Borrower from any of its obligations hereunder or under any of the Loan Documents, if any default occurs under the Senior Loan Documents or if Senior Lender asserts that Borrower,

Owner or Guarantor or any Affiliate of any of the foregoing has defaulted in the performance or observance of any term, covenant or condition of the Senior Loan Documents (whether or not the same shall have continued beyond any applicable notice or grace periods, whether or not Senior Lender shall have delivered proper notice to Borrower, Owner, Guarantor or such Affiliate, and without regard to any other defenses or offset rights Borrower, Owner, Guarantor or such Affiliate of any of the foregoing may have against Senior Lender), Borrower hereby expressly agrees that Lender shall have the immediate right, without notice to or demand on Borrower, but shall be under no obligation, (i) to pay all or any part of the Senior Loan that is then due and payable and any other sums and to perform any act or take any action, on behalf of Borrower or any other Loan Party as may be appropriate to cause all of the terms, covenants and conditions of the Senior Loan Documents to be performed or observed, and (ii) to pay any other amounts due and owing to contractors or subcontractors and take any other action as Lender, in its sole and absolute discretion, shall deem advisable to pay any such amount or cure any default or the rights and interests of Lender in the Loan or the Collateral. Borrower hereby indemnifies Lender from and against all Losses which may be imposed on, incurred by, or asserted against Lender as a result of the foregoing actions. Lender shall have no obligation to Borrower or any other Person to make any such payment or performance. Borrower shall not impede, interfere with, hinder or delay, any effort or action on the part of Lender to cure any default or asserted default under the Senior Loan, or to otherwise protect or preserve the Property and Lender's interests in the Loan and the Collateral following a default or asserted default under the Senior Loan. Borrower hereby grants Lender and any Person designated by Lender the right to enter upon the Property at any time following the occurrence of any default, or the assertion by Senior Lender that a default has occurred under the Senior Loan Documents, for the purpose of taking any such action or to appear in, defend or bring any action or proceeding to protect Borrower's or Lender's interest. Lender shall have no obligation to complete any cure or attempted cure undertaken or commenced by Lender. If Senior Lender or any Loan Party shall deliver to Lender a copy of any notice of default under the Senior Loan Documents, such notice shall constitute full protection to Lender for any action taken or omitted to be taken by Lender, in good faith, in reliance thereon. As a material inducement to Lender's making the Loan, Borrower, for itself, all to the maximum extent permitted by Law all other Loan Parties and all Affiliates of all of the foregoing, hereby absolutely and unconditionally releases and waives all claims against Lender arising out of Lender's exercise of its rights and remedies provided in this Section 6.1 or in the Intercreditor Agreement, except in the case of gross negligence or willful misconduct by Lender. Subject to the rights of Senior Lender (including pursuant to the terms of any subordination or waiver to which Lender is subject), in the event that Lender makes any payment in respect of the Senior Loan, Lender shall be subrogated to all of the rights of Senior Lender under the Senior Loan Documents against the Property, in addition to all other rights it may have under the Loan Documents. As between Lender and Senior Lender, nothing contained in this Section shall be deemed to affect any of the terms of the Intercreditor Agreement.

6.2 **Estoppels.** Borrower shall, from time to time, use its best efforts to obtain from Senior Lender such certificates of estoppel with respect to compliance by the Loan Parties with the terms of the Senior Loan Documents as may be reasonably requested by Lender. In the event or to the extent that Senior Lender is not legally obligated to deliver such certificates of estoppel and is unwilling to deliver the same, or is legally obligated to deliver such certificates of estoppel but breaches such obligation, then Borrower shall not be in breach of this provision so long as Borrower furnishes to Lender an estoppel executed by Borrower, expressly representing to

Lender the information requested by Lender regarding compliance by Borrower with the terms of the Senior Loan Documents. Borrower hereby indemnifies Lender from and against all Losses which may be imposed on, incurred by, or asserted against Lender based in whole or in part upon any fact, event, condition, or circumstances relating to the Senior Loan which was misrepresented in, or which warrants disclosure and was omitted from such estoppel executed by Borrower.

6.3 **Acquisition of the Senior Loan.** None of Borrower, Owner, any Guarantor, or any Affiliate of any of the foregoing, shall acquire or agree to acquire the Senior Loan, via purchase, transfer, exchange or otherwise, and any breach or attempted breach of this provision shall constitute an immediate Event of Default. If, solely by operation of applicable subrogation law, Borrower or any such other Person shall have failed to comply with the foregoing, then Borrower (a) shall immediately notify Lender of such failure, (b) shall cause such Person and all Affiliates of such Person acquiring any interest in the Senior Loan Documents (i) not to enforce the Senior Loan Documents, and (ii) upon the request of Lender, to the extent any such Person or Affiliate has the power or authority to do so, to promptly (A) cancel the Senior Note (as defined in the Senior Loan Documents), (B) reconvey and release any collateral under the Senior Loan Documents, and (C) discontinue and terminate any enforcement proceedings under the Senior Loan Documents. Borrower hereby expressly covenants and agrees that, in the event that Lender acquires the Senior Loan and, at any time thereafter when an Event of Default shall have occurred or be continuing, then, at Lender's option, exercised in Lender's sole and absolute discretion, Lender may elect (x) to declare that the Senior Loan is in default (which default shall not be subject to any grace, notice or cure periods), and (y) to accelerate the Senior Loan.

6.4 **Deed-in-Lieu.** Borrower shall not enter into or permit Owner to enter into any deed-in-lieu or consensual foreclosure with or for the benefit of Senior Lender. Without the express prior written consent of Lender, Borrower shall not enter into or permit Owner to enter into any consensual sale or other transaction in connection with the Senior Loan which could terminate or materially diminish, impair or otherwise adversely affect the interests of Lender in the Collateral or any portion thereof or any interest therein or interest of Borrower or Owner in the Property, any portion thereof or any interest therein.

6.5 **Senior Loan In Balance.**

(a) Borrower shall not use or permit the use of any proceeds of the Senior Loan for any purpose not included in the Construction Budget.

(b) Borrower shall keep the Senior Loan "in balance" at all times prior to Completion. The Senior Loan is "in balance" when the remaining undisbursed proceeds of the Senior Loan (including any retainage held by Senior Lender), together with any deposits previously made by Borrower and held by Senior Lender, are sufficient to Complete the Improvements and to pay all interest, fees and charges relating to the Senior Loan (as estimated by Lender) through the Completion, including legal, architectural and engineering fees. At Lender's request, Borrower shall demonstrate to Lender's reasonable satisfaction that the Senior Loan is "in balance."

(c) Borrower shall only use the interest reserve maintained by Senior Lender to pay debt service on the Senior Loan or for hedging costs related to the Loan and/or the Senior Loan, and for no other purpose. If cash flow and other revenue from the Property is sufficient to pay debt service under the Senior Loan, Borrower shall pay such debt service from cash flow rather than from the interest reserve to the extent allowed by Senior Lender. The contingency reserve maintained by Senior Lender shall only be used to pay for cost overruns of items set forth in the Construction Budget.

6.6 **Copies of Senior Loan Requests.** Borrower shall provide Lender or at Lender's direction, Lender's Consultant, on a monthly basis, with copies of all draw requests which are provided to or for Senior Lender. Lender reserves the right to require Borrower to notify Lender of the date, time and location of all draw request meetings so that Lender or Lender's Consultant may, at its option, attend such meetings at Borrower's expense.

6.7 **Lender's Right Not Conditioned Upon Event of Default.** Notwithstanding anything to the contrary contained herein, the ability of Lender to exercise the rights and remedies set forth in this Article 6 shall not be conditioned upon the occurrence of an Event of Default, except to the extent expressly set forth in this Article.

ARTICLE 7 - CASUALTY AND CONDEMNATION

7.1 **Lender's Election to Apply Insurance and Condemnation Proceeds to Indebtedness.**

(a) In the event of any loss or damage to any portion of the Property due to fire or other casualty, or any taking of any portion of the Property either by condemnation or under power of eminent domain, where Senior Lender does not have the right to settle or compromise any insurance claims or condemnation claims (or in the event Senior Lender has such right to settle or compromise such claims but waives such right), and subject to the terms of the Constituent Documents following recordation of the Declaration, Borrower shall have the right to cause Owner to settle insurance claims and condemnation claims or awards (i) of less than \$250,000 without Lender's prior consent so long as there has occurred no Event of Default, and (ii) for \$250,000 or more with Lender's prior written approval, not to be unreasonably withheld or delayed.

(b) If Senior Lender is entitled and elects to apply any insurance proceeds or condemnation award to the Senior Loan, then the balance of any such proceeds or award, as the case may be, not so applied to the Senior Loan shall be paid to Lender and applied to the Indebtedness, subject to (i) Borrower's rights under Section 7.2 and (ii) the Constituent Documents following recordation of the Declaration. If Senior Lender makes any insurance proceeds or condemnation award available to Owner for restoration of the Property subject to the terms of the Senior Loan Documents, any portion of such proceeds or award remaining after completion of such restoration, not required to be applied to repay the Senior Loan, shall be paid to Lender and applied to the Indebtedness, subject to the

Constituent Documents following recordation of the Declaration. If any insurance proceeds or condemnation award is paid to Senior Lender for disbursement, Borrower shall deliver or cause Owner to deliver to Lender copies of all written correspondence delivered to and received from Senior Lender that relates to such insurance proceeds or condemnation award.

(c) Except to the extent expressly provided to the contrary in Section 7.1(b) or Section 7.2, and subject to the terms of the Constituent Documents following recordation of the Declaration and the terms of the Senior Loan Documents in the form in which they exist as of the date hereof, any condemnation award or insurance proceeds shall, at the option of Lender, in its sole and absolute discretion, be applied to the payment of the Indebtedness or applied to reimburse Borrower or Owner for the cost of restoration of the Property in accordance with the terms of Section 7.2 of this Agreement. If Lender is entitled to and so elects to apply any insurance proceeds or condemnation award towards the Indebtedness, and if such proceeds or awards are insufficient to pay the Indebtedness in full, Lender shall be entitled to declare the balance remaining unpaid on the Note to be due and payable forthwith and to avail itself of any of the remedies afforded under any of the Loan Documents as in the case of any default beyond applicable cure periods thereunder. Any proceeds remaining after application to the Indebtedness shall be paid by Lender to Borrower or the party then entitled thereto.

7.2 Borrower's Obligation to Rebuild and Use of Proceeds Therefor. If any insurance or condemnation proceeds are paid to Lender and an Event of Default has not occurred, Lender shall, after deduction of all expenses of collection and settlement, including attorneys' and adjusters' fees and expenses, release periodically such insurance proceeds or condemnation award received by Lender to Borrower or Owner as long as Borrower or Owner shall:

(a) Expediently repair and restore all damage to the portion of the Property resulting from such casualty or condemnation, including completion of the work contemplated as part of the Property if such casualty or condemnation shall have occurred prior to Completion, so that the Improvements will be Completed in accordance with the terms of this Agreement; and

(b) If the insurance proceeds or condemnation award (and the undisbursed available proceeds of the Loan and the Senior Loan for work contemplated as part of the Project) are, in Lender's reasonable judgment, insufficient to complete the repair and restoration of the Property, then Borrower or Owner shall promptly deposit with Lender or Senior Lender pursuant to arrangements satisfactory to Lender the amount of such deficiency.

Any request by Borrower for a disbursement by Lender of insurance proceeds or condemnation awards and funds deposited by Borrower or Owner pursuant to this Section 7.2 and the disbursement thereof shall be conditioned upon Borrower's compliance with and satisfaction of the same conditions precedent as would be applicable in connection with construction loans

made by institutional lenders for projects similar to the Property, including absence of default, approval of plans and specifications (unless the restoration work is Completion of the Project), submittal of evidence of completion, updated title insurance, lien waivers, and other customary safeguards.

ARTICLE 8 - EVENTS OF DEFAULT; REMEDIES

8.1 **Events of Default.** The occurrence of any one or more of the following events shall constitute an "Event of Default":

(a) Failure to of Borrower repay principal under the Note when due; or

(b) Failure of Borrower to pay, within five (5) days of the due date, any of the Indebtedness (except for repayment of principal) or a failure by Borrower to observe or perform any obligation, covenant, condition, or agreement herein to be performed by Borrower which involves the payment of money (i) to Lender, within five (5) days following the due date and (ii) to any other Person, within five (5) days following notice thereof to Borrower; or

(c) Failure of Borrower to comply with Sections 4.16 (ERISA); 4.19 (Single Asset Entity); 5.3 (Insurance); 5.11 (Inspection); 5.15 (Use of Loan and Senior Loan Proceeds; Distribution and Use of Cash Flow); 5.19 (Existence; Compliance with Legal Requirements); 5.20 (Change in Business); 5.21 (No Amendments of Organizational Documents); 5.22 (Transfers of the Property or Beneficial Interests in Borrower); 5.23 (No Additional Liens or Encumbrances); 5.24 (No Additional Indebtedness); 5.25 (Nonexempt ERISA Transactions); 5.26 (Plan Assets); 5.35 (Construction of Property); 6.1 (Compliance with Senior Loan Documents; Lender Cure); 6.3 (Acquisition of Senior Loan); or 6.4 (Deed-in-Lieu) of this Agreement, which failure is not cured by Borrower within fifteen (15) business days of the occurrence thereof; or

(d) Breach of any covenant, representation or warranty set forth in this Agreement (other than as set forth in any other paragraphs of this Section 8.1) which is not cured within thirty (30) days after written notice thereof to Borrower from Lender; provided, however, if such breach cannot by its nature be cured within thirty (30) days, and Borrower has commenced such cure within such thirty (30) day period and, thereafter, diligently pursues the curing thereof (and then in all events cures such failure within ninety (90) days after the original notice thereof), Borrower shall not be in default hereunder; or

(e) A petition under any chapter of the Bankruptcy Code or any similar law or regulation is filed by or against Borrower or Owner (and in the case of an involuntary petition in bankruptcy, such petition is not discharged within sixty (60) days of its filing), or a custodian, receiver or trustee for the Property is appointed, or Borrower or Owner makes an assignment for the benefit of creditors, or any of them are adjudged insolvent by any state or federal court of competent jurisdiction, or any of them admit their insolvency or inability to pay

their debts as they become due or an attachment or execution is levied against Borrower or Owner, the Property or the Collateral; or

(f) Breach of any covenant, representation, or warranty in any other Loan Document which is not cured prior to the expiration of any cure period applicable thereto or, if none is specified, within thirty (30) days after written notice thereof to Borrower from Lender; provided, however, if a breach for which no other cure period is specified cannot by its nature be cured within thirty (30) days, and Borrower has commenced such cure within such thirty (30) day period and, thereafter, diligently pursues the curing thereof (and then in all events cures such failure within ninety (90) days after the original notice thereof), Borrower shall not be in default hereunder; or

(g) The failure at any time of the Pledge Agreement to be a valid perfected first priority lien upon any of the Collateral described therein; or

(h) (i) Borrower or Owner shall default in the payment of any indebtedness of Borrower or Owner, (ii) Borrower or Owner shall fail to cure any such default within the time, if any, specified therefor in any agreement governing the indebtedness, and (iii) the aggregate amount of all of such indebtedness under which Borrower or Owner individually has defaulted exceeds, in the aggregate, \$100,000; or

(i) Any statement, report or certificate made or delivered to Lender by any Loan Party is not materially true and complete as of the date thereof; or

(j) The occurrence of an "Event of Default" under the Senior Loan Documents (without regard to whether Lender subsequently effectuates a cure of such default); or

(k) If the collective aggregate value of the Available Assets of the Guarantors (calculated on the basis provided in the notes to the Estimated Collateral Value Statement dated as of June 30, 2004) falls to less than \$50,000,000, unless the Guarantors correct such deficiency within thirty (30) days following the occurrence of such event. Guarantors may correct such deficiency by: (i) obtaining and delivering to Lender one or more new guaranties, each of which shall be in form and content substantially the same as the Completion Guaranty and the Carve-Out Guaranty (or in such other forms as Lender may in its good faith business judgment approve) from one or more persons whose Available Assets are sufficient to correct the deficiency, (ii) delivering to Lender and thereafter maintaining in full force and effect (for so long as the deficiency exists) an unconditional and irrevocable letter of credit, in a face amount sufficient to correct the deficiency, naming Lender as beneficiary, and otherwise in form and content and issued by an institution acceptable to Lender in the exercise of its good faith business judgment, or (iii) amending the Completion Guaranty and the Carve-Out Guaranty (in form and substance acceptable to Lender in the exercise of its good faith business judgment) in a manner such that

the definition of Available Assets is expanded to include additional assets that are sufficient to correct the deficiency and otherwise acceptable to Lender in its good faith business judgment; or

- (l) If at any time Lender or Lender's Consultant determines in its reasonable judgment that Completion cannot be achieved by the Required Completion Date.
- (m) Failure of Borrower to cause Owner to execute the Assignment of Accounts in the form attached hereto as Exhibit H within five (5) business days of the date upon which the Senior Loan has been repaid.

8.2 Acceleration; Remedies. Subject to the rights of the Senior Lender under the Intercreditor Agreement, upon the occurrence of any Event of Default, Lender shall have the right but not the obligation to pursue any one or more of the following remedies concurrently or successively, it being the intent hereof that all such remedies shall be cumulative and that no such remedy shall be to the exclusion of any other:

- (a) declare the Note to be immediately due and payable; and
- (b) institute proceeding, judicial or otherwise, for the enforcement of its rights under the Loan Documents or under any applicable provision of Law, including to dispose of all or any part of the Collateral in satisfaction of the Indebtedness; and
- (c) institute an action, suit or proceeding in equity for the specific performance of any covenant, condition or agreement contained in the Loan Documents; and
- (d) exercise any and all rights and remedies granted to a secured party upon default under the applicable Uniform Commercial Code; and
- (e) use and apply any monies deposited by Borrower or any other Loan Party with Lender, regardless of the purpose for which the same was deposited, to cure any such default or to apply on account of the Indebtedness; and
- (f) take any action whatever which, in Lender's sole judgment, is necessary or appropriate to fulfill the covenants, agreements and obligations of Borrower under this Agreement and the Loan Documents, including the right to (i) Complete the Improvements, (ii) avail itself of and procure performance of existing contracts and subcontracts, including the Construction Contract and all other Construction Documents, and (iii) let any contracts with the same contractors and subcontractors or others and to employ watchmen to protect the Property from injury; and
- (g) withhold further disbursement of the proceeds of the Loan; and